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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 756

NEWS SYNDICATE CO., INC.,

Petitioner,

—against—

GEORGE W. SHILES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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GEORGE G. HUNTER, JR.
On the brief

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The Case

Under the headlines "Wife Says Exec Had Harem" and "Wife Says Exec Built a Harem in the Sky," petitioner published in its DAILY NEWS and SUNDAY NEWS lurid charges of respondent's wife in a New York separation action. Petitioner in the same articles repeated details of the most intimate and embarrassing nature from an affidavit respondent himself had submitted to the court. Respondent sues for libel for publishing the lurid charges and for invasion of privacy for revealing respondent's intimate matters as well as for revealing the lurid charges. Respondent was a $33,000 a year Vice President of American Airlines. He had been with the company for 27 years

and says he was summarily discharged upon the publication of the first of these articles.

Petitioner obtained the material for these articles from respondent's wife. She handed petitioner's reporter carbon copies of pleadings and affidavits including respondent's own affidavit which had been filed in the court. This case turns on the New York statute (§235 of Domestic Relations Law) which prohibited the clerk of the court from displaying to petitioner or any other member of the public, the originals of those same papers. Respondent maintained that since the public was barred by statute from examining the papers, the New York privilege statute (§74 of Civil Rights Law) which grants absolute privilege to report judicial proceedings did not extend over into this area. The Court of Appeals agreed but petitioner complains that this violates its constitutional rights.

A Writ Should Be Denied

Because false, scandalous and offensive charges and countercharges are commonplace in matrimonial actions, it has been the declared public policy of the State of New York since 1847 to bar the general public from the court files in such actions. Originally that policy was enforced by rule (1847—Gen. Rules of Proc., 118). It continued by rule until 1962 (Rule 278 of Rules of Civil Procedure) but that year it was incorporated in a statute (§235 of Domestic Relations Law).* The reason for the decision

* The pertinent part of §235 is set forth in the opinion of the Court of Appeals (Appendix p. 4a). Petitioner sets forth a version of it in the appendix but that version includes an amendment added after the publications complained of (Appendix p. 24a).

below is simple. The privilege statute (§74 of Civil Rights Law)* should not give the right to publish without liability for damages scandalous material from which the public is barred by another statute (§235 of Domestic Relations Law).

This is not new law. Before a 1956 amendment to the privilege statute which extended its scope, the same question was raised in libel actions and the determination was the same, namely, that contents of matrimonial files were published at peril. *Danziger* v. *Hearst Corp.*, 304 N.Y. 244; *Stevenson* v. *Hearst Consolidated Pub.*, 214 F.2d 902, cert. denied 348 U.S. 874;** *Stevenson* v. *News Syndicate Co., Inc.*, 276 App. Div. 614.

The New York Court of Appeals made it abundantly clear in *Danziger, supra,* that the secrecy statute (§235 of Domestic Relations Law) in no way whatsoever limits the absolute right to report *without tort liability* the fact that a matrimonial action had been brought; to report the courtroom proceedings; and to report the decision or verdict. Moreover the *Danziger* decision made it just as clear that a publisher also had the right to publish the contents of the secret files but he did so at his peril and was liable for damages if it was defamatory. More particularly the *Danziger* opinion stated:

> "The defendants assail rule 278† as violation of the constitutional guarantees of freedom of the press. This criticism of the rule fails, we think, to take proper

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* §74 also is set forth (Appendix p. 26a).

** It is significant that certiorari was denied in this case.

† As already noted Rule 278 was the predecessor of §235 of Domestic Relations Law.

> account of its scope and purpose. The rule [now statute] is addressed to officers and clerks of the New York Supreme Court. It does not prohibit access to the minutes of the clerk of the court and thus does not interfere with the right of any person to obtain information in respect of the pendency or result of any matrimonial action. Nor does the rule prohibit publication of the details of a matrimonial action that are obtained from a source other than the files of the court. Of course, such a publication is actionable if defamatory. But this liability for indefensible defamation cannot be taken to be an unconstitutional restriction of the freedom of the press" (at pp. 248-249).

Manifestly, if the wife had not filed the papers, we would have a simple case of libel and invasion of privacy and even petitioner would agree that it would not justify this petition. But since the papers were filed in court, petitioner asserts a right to broadcast them as a part of a judicial proceeding. Petitioner's claim boils down to the proposition that there is a constitutional right to report a judicial proceeding and it is so inflexible, sweeping and overriding that it precludes any such things as confidential court files. That, says petitioner, abridges freedom of the press. We do not suggest that the constitution does not guarantee the right to report judicial proceedings within some limits that might be defined. But we do suggest that this case does not fall within any such area. Here we deal with a statute not only dictated by common decency but with a long history of sound public policy designed to protect individuals from this crude scandalmongering and sensationalism. Since no one denies the right of petitioner to exercise its bad taste and publish these vicious articles,

the claim that the court below abridges freedom of the press for merely imposing tort liability is a hollow claim. It is far-fetched and raises no genuine constitutional question. Petitioner might as well argue that imposing damages for any libel abridges freedom of the press.

We do feel called upon to answer one specific argument made by petitioner. It suggests that *Time, Inc.* v. *Hill*, 385 U.S. 374, is authority for the proposition that truth is a complete defense in an action for invasion of privacy (Pet. pp. 9-10).* That argument is untenable. In the *Hill* opinion this Court said:

> "In the light of questions that counsel were asked to argue on reargument, it is particularly relevant that the Court of Appeals made crystal clear in the *Spahn* opinion that truth is a complete defense in actions under the statute based upon reports of newsworthy people or events. * * * " (at pp. 382-383).

Plaintiff is not a public figure. Moreover the contents of a file from which the public is legally barred hardly can be considered legally newsworthy.

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* Petitioner gives the impression that the court below has held that truth is never a defense regardless of whether or not a public figure is involved. More particularly, petitioner twice quotes the court below as follows: "* * * truth is irrelevant to a charge of invasion of privacy" (Pet. pp. 2 & 5). But petitioner ignores the opening sentence of the paragraph which commences: "Nor, where no public figure is involved * * * " (Appendix p. 13a).

CONCLUSION

A writ of certiorari should be denied.

Respectfully submitted,

LAWRENCE I. BROWN
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